within this borderland, and surely to renounce it may be the basis of a contract right.

The serious difficulty in such cases is always one of fact, whether there was the intention to give the promise in exchange for the abstinence. (It is usually clear that the abstinence is in exchange for the promise.) It is on this ground that it is natural to find apparent conflicts, as in promises of reward from fathers to sons for various kinds of good conduct; for it is almost impossible in many cases to tell a promise to make a gift on a condition, from an offer for a contract. As a rule it is really a case of guessing on rather subtle psychological grounds, and the courts probably keep as near to the facts in leaning towards finding a consideration as they would in tending the other way.

OWNERSHIP AND POSSESSION OF AEROLITES. — A case which has excited much comment in the last few months is that of *Goodard* v. *Winchell*, 52 N. W. Rep. 1124, decided by the Supreme Court of Iowa. An aerolite, weighing sixty-six pounds, fell on the prairie land of the plaintiff, and embedded itself to a depth of three feet below the surface of the soil. The grass privilege of the land had been leased by the plaintiff to a tenant, by whose order the aerolite was dug up and sold to the defendant. The plaintiff brought an action in replevin against the defendant. Counsel for the defence invoked the rule of title by occupancy, and cited Blackstone to prove that "occupancy is the taking possession of those things which before belonged to nobody," and that "whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor, and as such are returned into the common stock and mass of things; and therefore they belong, as in a state of nature, to the first occupant or finder." The plaintiff prevailed, however, the court being of opinion that the aerolite was not a "movable" within the spirit of the rule cited. The reasoning on which the decision proceeds is most ingenious; thus, we find "that to take from the earth what nature has placed there in its formation, whether at the creation or through the natural processes of the acquisition and depletion of its particular parts, as we witness it in our daily observation, whether it be the soil proper or some natural deposit, as of mineral or vegetable matter, is to take a part of the earth, and not movables." Whether or not one believes this to be the true underlying theory of the decision, — and the correctness of the result actually reached is undoubted, — one cannot but regret that the court failed to consider the question of possession as well as that of property, so often have the facts of the case provoked discussion.

There are two essential elements to actual possession of a chattel: (1) the power of control, which is a question of fact; and (2) an intention to make a use inconsistent with the right of another to immediate control. The second element includes, of course, the intention to prevent others from interfering with the proposed use. The intention governs, and has been considered from either of two points of view. Holmes believes it to be the intention to exclude others; while the German writers look upon it as the intention to use for one's own purposes, without reference to others. That power of control must be coupled with intention to exclude in order that there may be actual possession, is shown by Holmes in an apt illustration. "If," he writes, "there were only one other man in the world, and he was safe under lock and key in jail, the person having the

key would not possess the swallows that flew over the prison." One may go farther with this illustration, and show that there would have to be something more than a power of control and an intention to exclude others, in order to give the person having the key actual possession of the chattels about him. If, for instance, he were a man of discrimination, he would see on all sides things he would not want, though they were within his control, and he did not intend to allow the prisoner to use them; and of those things he could not be said to be possessed. In other words, it is best not to look at the element of intention from either of the above-mentioned points of view exclusively: for actual possession of a chattel there must be power of control; an intention to make a use inconsistent with possession in any one else; and an intention to exclude every one else from interfering with such use. These two intentions must be joined, for they are complementary. Applying these principles to the leading case of *Merry* v. *Green*, 7 M. & W. 623, one finds there was an intention on the part of the plaintiff to use the contents of the secretary and to exclude others, and that this intention was fulfilled, and therefore possession was taken. Coming to the Iowa case, to find the requisite intention one must go back of acquiring of title to the land: ownership of the land includes an intention to make use of the rights of ownership in the well-known cases of animals *feræ naturæ*, and falling fruit. And so here, the plaintiff must be taken to have intended to appropriate to his exclusive use aerolites, as he would rain and snow which might fall upon his land.

THE POLICE POWER AND THE LAKE FRONT CASE. — That interesting and dangerous thing called the police power, as noticeable for its vagueness as for its necessity, is often rather wildly talked about, though the actual decisions have confined it, with fair success, to the protection of the public health and the public morals, on the one hand, and on the other to limiting the legislative power to acts which may within the bounds of reason be supposed to lead towards the objects which the Legislature is authorized to seek. In the Chicago Lake Front Case[1] the Supreme Court have said that, as the soil under navigable waters is held by the people of the State in trust for the common use, any legislation concerning their use affects the public welfare. "It is therefore appropriately within the exercise of the police power of the State." The decision must go the whole length of the language, for the grant was made twenty-five years ago, when it was much less valuable, and it was so carefully conditioned that the least infringement by the company of public rights would forfeit their title. The decision must be that any large grant of the kind is a license revocable by the Legislature whenever in the judgment of the court such an interpretation would largely promote the pecuniary welfare of the community; for it is here only pecuniary welfare that is affected: the community saves what constitutional confiscation would cost.

These large questions of the division of the sovereign powers among the departments of our government cannot be adequately treated by curt logical reasoning, but call rather for trained political instinct and broad judgment. Therefore, to say that the minority judgment is clearer and supported by authorities more direct, is not necessarily to prove that it is sounder; nevertheless, their arguments are very hard to escape. The power to grant such land, they reason, is admitted by the majority, and

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[1] *Illinois Central R. R. Co.* v. *State of Illinois*, 13 Sup. Ct. Rep. 110.